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MODERNISATION OF EUROPEAN UNION COMPETITION LAW

I. INTRODUCTION

1. EU competition law has three main elements:
   - a prohibition on anti-competitive agreements – Article 81 of the Treaty of Rome (ex Article 85)
   - a prohibition on abuses of a dominant position – Article 82 of the Treaty of Rome (ex Article 86)
   - a system of merger control – the Merger Control Regulation, No 4064/89.
2. The procedural rules for applying each of these elements are currently being reformed. At present, the rules for applying Articles 81 and 82 are contained in Regulation 17, which came into force in 1962. These rules, which are now over 40 years old, are out of date. The EU' s Council of Ministers is expected to adopt a new regulation at its meeting on 26th November 2002 in Brussels. This process of reform is referred to as the „modernisation" of EU competition law. The new regulation will come into effect on 1st January 2004, and so will be in force when Hungary joins the Eu.
3. The Merger Control Regulation is also being amended. The proposals were announced by Professor Mario Monti, the European Commissioner for Competition, on 7th November 2002. They will be brought into effect in 2003.

II. MODERNISATION OF ARTICLES 81 AND 82

4. Modernisation will not affect the substance of Articles 81 and 82. These will continue to provide as follows:

Article 81

(1) The following shall be prohibited as incompatible with the common market:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, which allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question

Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

5. There will be three main procedural changes:
   - who enforces Article 81 (3)
   - EC competition law to have primacy, except for purely national agreements and practices
   - „federal" approach to enforcement by the Commission and national competition authorities.

Who enforces Article 81(3)

6. Until now, only the European Commission has had the power to enforce Article 81(3). That means that where an agreement restricted competition, but did so to achieve benefits in accor-

dance with Article 81 (3), only the European Commission had the power to grant exemption to the agreement. This required that the agreement be notified to the European Commission for aspecific exemption.

7. This obviously caused a huge workload for the European Commission. It attempted to deal with the problem by making „block exemptions" (also known as „group exemptions") for defined categories of agreement. However, the real world does not fit neatly into defined categories and many agreements continued to fall outside these block exemptions. They continued to need individual exemption.
8. This was an impractical system even before the UK became a member of the EU in 1973 when there were only 6 EU Member States. Now there are going to be 25 Member States it is obviously unworkable, and has been abandoned.
9. Under the new system, it is for national courts and competition authorities to decide in any particular case whether an agreement complies with Article 81(3). This is similar to the way in which they currently have powers to decide whether a practice is an abuse of a dominant position under Article 82.
10. To take a typical example, if the parties to a contract are in dispute and one alleges that the agreement infringes Article 81 (1), and so restrictions in it are void and cannot be enforced, it will be possible for the other party to convince the court that the agreement, even if it does infringe Article 81 (1), complies with the requirements of Article 81(3). Previously, the court could not make a decision on that point and the case might have had to be suspended while the European Commission made a decision on this question.
11. In my view, this is a sensible and long overdue reform. It makes the enforcement of Article 81 much more similar to the way in which the equivalent US legislation, section 1 of the Sherman Act 1890, is enforced.

Primaer of EC law

12. It is obvious that national competition law cannot permit an agreement or practice which is prohibited by EU competition

law. This would be contrary to the fundamental constitutional principle of the supremacy of EU law.

13. A much more difficult question is whether national competition law can prohibit an agreement or practice which is permitted under EU competition law. The European Commission would like the answer to this question to be „no". However, some Member States want to have this power.
14. It is not yet clear exactly how the Modernisation Regulation will finally answer this question: this is one of the most difficult areas to be decided at the EU Council meeting on 26th November 2002. It seems possible that a compromise will be negotiated under which national competition law cannot prohibit an agreement or practice permitted by EU competition law, but other national laws may still apply. The difficulty with such a compromise is to decide what is meant by a national „competition" law. For example, is a law against misleading advertising a competition law – because it certainly affects how businesses compete with each other.
15. Also, it will become very important to know whether EU law actually applies to an agreement or practice. The EU jurisdictional test – equivalent to the inter – State commerce test in the constitution of the USA – is whether there is an effect on trade between Member States. The European Commission will publish a Notice on this test in 2003. The impact of the test varies depending on the geographic location of each Member State. In the UK, it is often harder to show an effect on trade – because it is an island nation. By contrast, Hungary will have more land borders with EU Member States than the UK or the Nordic States.

Federal approach to enforcement

16. Finally, the main reason given by the European Commission for ending the system of individual exemptions under Article 81(3) is so that they can devote more resources to enforcing Articles 81 and 82 in cases which are of major EU significance. Accordingly, the European Commission wants to co-ordinate with Member States' competition authorities so that cases that affect only one or two Member States are dealt with at national level. The

European Commission plans only to investigate cases where there is an effect on at least three Member States.

17. As a result, the Modernisation Regulation will give national competition authorities the powers to apply Articles 81 and 82, as well as their own national competition legislation.

Conclusion on Modernisation

18. When Hungary joins the EU, it will be in a very different position in relation to competition law to that which the BK found itself when it joined in 1973. At that time, European competition law was seen as being of little importance and was, in any event, something that only happened in Brussels.
19. Now, competition law is clearly of fundamental importance to the European Union. Moreover, it is a body of law which is applied and enforced by every competition authority in the European Union as well as by the European Commission itself. It is also law which can be relied upon in every court in the European Union. No commercial lawyer in the European Union can afford to ignore the potential implications of Articles 81 and 82 for the businesses which they advise

III. REFORM OF THE MERGER CONTROL REGULATION

20. The European Merger Control Regulation governs the largest mergers, measured by turnover, in the European Union. If the size of the merger does not cross certain thresholds – such as the combined turnover being in excess of 5 billion euros – then national merger laws apply and EU law does not. Obviously, it will be unusual for a commercial lawyer to be dealing with cases falling under the Merger Control Regulation on a regular basis, unless the lawyer works for one of the large law firms specialising in this area.
21. I do not intend, therefore, to cover the Merger Control Regulation in this talk. I will, however, note the main changes which are proposed by Commissioner Monti as this may be of interest to those advising in the merger field.
22. There will be no change from the current dominance test to the „substantial lessening of competition" (SLC) test, but there will

be clarification in the ECMR that the Commission will assess whether a transaction leads to both single firm dominance and whether there are „unilateral effects" in situations of oligopoly.

23. There will be a Commission Notice on the assessment of dominance in horizontal mergers, and Commission Notices on vertical and conglomerate effects will follow. The first Notice will include guidelines on when factors such as buyer power, ease of market entry and efficiencies can be considered to mitigate the anticompetitive effects of a merger.
24. The Commission will expressly recognise that efficiencies arguments will be taken into account in its assessment of a merger, although the parties as will have to prove that the efficiencies will directly benefit consumers, as well as being merger-specific, timely and verifiable. The draft guidelines will indicate that it is very unlikely that efficiencies could be accepted as sufficient to permit a merger leading to monopoly or quasi-monopoly to be cleared.
25. There will be a new position of Chief Competition Economist, directly attached to the Director General, to oversee the economic analysis in all competition cases, and the Commission will extend the appointment of economists and the use of outside economic advisers. There will be a Panel review system in Phase II cases, whereby officials independent of the case team will scrutinise cases at crucial points during the investigation, and a new Unit in DG Competition will be set up to administer the Panel.
26. Parties to a merger will be given earlier access to the file, as well as ad hoc access to third party views, subject to the protection of confidential information, where those views differ from the merging parties' views. Merging parties will also be able to have a meeting with complaining third parties before a Statement of Objections is issued. Merging parties will be able to attend state of play meetings with the Commission at decisive points in the case.
27. The role of the hearing officers will be strengthened, and they will be given more resources to enable them to be effective. The Commission will also enhance the input of consumers in the

merger review process, by establishing a consumer liaison function to involve consumer bodies in the review of cases.

28. On timing, merging parties will be able to request a further three weeks in Phase II proceedings following the submission of an offer of remedies. Four weeks will also be able to be added to Phase II proceedings at the request of the parties or at the request of the Commission, in the latter case with the consent of the parties, where the evidential burden of the Commission in the case warrants the extension.
29. The parties to a mergers will be able to notify a transaction prior to the conclusion of an agreement, and the current one-week deadline will be abolished, so long as the parties do not complete the transaction before they obtain clearance.
30. The proposed reforms should greatly improve the effectiveness of the EC merger control system, in terms of substance and procedure, whilst maintaining the benefits of the „one-stop shop" established by the ECMR.
31. However, the Commission has clearly tried to respond positively to the need to improve in particular its economic analysis of merger cases and the transparency of its merger control proceedings, in the light of the recent judgments of the Court of First Instance on the Commission's Merger Decisions in AirTours/First Choice, Scheider/Legrand and Tetra Laval/Sidel.